

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES ALLEN BROWN, JR.,

Defendant-Appellant.

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UNPUBLISHED

June 26, 2014

No. 314986

Kent Circuit Court

LC No. 12-004070-FC

Before: SAWYER, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felony-murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a habitual offender, second offense, MCL 769.10, to life imprisonment for the murder conviction, 40 to 80 years' imprisonment for the armed robbery conviction, 40 to 80 years' imprisonment for the conspiracy conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm defendant's convictions, but remand for resentencing.

Defendant's convictions arise from a robbery during a drug transaction. Nick Slater sold medical marijuana that was not obtained legally. Slater was advised of a person who was interested in purchasing marijuana. Because Slater was nervous about the sale to a new person, he asked the victim to accompany him during the sale. At the arranged location, defendant<sup>1</sup> and Vernon Heath gave Slater money to hold while they inspected the marijuana. Defendant pulled a handgun and demanded the marijuana. A struggle ensued over Slater's cellular telephone, and defendant fired the gun into the van, which killed the victim. Defendant was identified by Slater as the perpetrator of the offenses, Heath testified against defendant at trial, and defendant's fingerprint was found on the exterior door of Slater's vehicle. Despite his claim of self-defense, defendant was convicted as charged.

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<sup>1</sup> Defendant also was present at a party before the robbery and told some of the attendees of his intent to rob the dealer.

Defendant argues that the trial court erred in admitting evidence of defendant's gang affiliation, which defendant characterizes as irrelevant to the determination of any matter at issue in this case.

"A trial court's decision to admit evidence is reviewed for a clear abuse of discretion." *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). MRE 402 provides that "[a]ll relevant evidence is admissible." MRE 401 defines relevant evidence as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The testimony at trial revealed that the police were investigating a series of gang related shootings. The type of gun used to kill the victim was attributed to three other shootings at the homes of Bemis gang members. Testimony at trial also revealed that if a member of the Bouldercrest gang needed a gun, Jemonte Brown, was the person to contact. Brown gave a .38-caliber gun to defendant. Defendant admitted that he was a Bouldercrest member, and he took a gun from Brown. This evidence established defendant's possession of the murder weapon just before the shooting, a fact that tended to make his identity as the shooter more probable. Moreover, the fact that defendant was affiliated with Bouldercrest and Brown explained *how* and *why* defendant obtained the gun that was used to kill the victim. Therefore, defendant's relationship with gang members was relevant to show that he was the shooter who killed the victim, and defendant's gang affiliation was relevant under MRE 401 and MRE 402. The trial court did not abuse its discretion. *Coy*, 258 Mich App at 12.

Defendant also argues that the prosecutor intimidated four witnesses into testifying against defendant by using investigative subpoenas and threatening them with perjury charges. We review this unpreserved claim of prosecutorial misconduct for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In *People v Stacy*, 193 Mich App 19, 25; 484 NW2d 675 (1992), we acknowledged that "[b]oth our Supreme Court and this Court have strongly condemned prosecutorial intimidation of witnesses." Prosecutorial intimidation, if successful, amounts to a denial of a defendant's constitutional right to due process. *People v Canter*, 197 Mich App 550, 569-570; 496 NW2d 336 (1992). In this case, witnesses were called to testify pursuant to an investigative subpoena. When it became apparent that two witnesses lied under oath, the witnesses were charged with perjury. In exchange for their pleas to perjury, the witnesses were given probation and agreed to testify at trial. Two other witnesses were warned of the consequences of providing false testimony or learned of the perjury charges pending against other witnesses and indicated that they wanted to avoid the same fate. This evidence does not support a claim of witness intimidation. Rather, the prosecutor merely reminded the witnesses of the consequences of providing false testimony, which the prosecutor may do. *People v Layher*, 238 Mich App 573, 587; 607 NW2d 91 (1999). Defendant has not shown plain error. *Carines*, 460 Mich at 763.

Next, defendant argues that during the prosecutor's closing argument, the prosecutor improperly attacked the veracity of defense counsel. Again, we review this unpreserved claim of prosecutorial misconduct for plain error. *Id.*; *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of

judicial proceedings, independent of defendant's innocence." *Ackerman*, 257 Mich App at 448-449. Where a curative instruction would have alleviated the prejudicial effect of any prosecutorial questioning or comment, error requiring reversal has not occurred. *Id.* at 449. "Prosecutors have discretion on how to argue the facts and reasonable inferences arising therefrom, and are not limited to presenting their arguments in the blandest terms possible." *People v Meissner*, 294 Mich App 438, 456; 812 NW2d 37 (2011). The defendant bears the burden of demonstrating that the prosecutor's conduct resulted in a miscarriage of justice. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). "A prosecutor may fairly respond to an issue raised by the defendant." *Id.* at 135.

When preserved, a claim of prosecutorial misconduct is sustained where the conduct of a prosecutor denies a defendant a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Claims of prosecutorial misconduct are reviewed on a case by case basis, with the prosecutor's remarks evaluated in context. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). A prosecutor may not denigrate defense counsel by questioning counsel's veracity because it undermines the defendant's presumption of innocence and impermissibly shifts the jury's focus from the evidence to defense counsel's personality. *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988) (citation omitted). Thus, a prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). However, "an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Defendant asserts that the prosecutor engaged in misconduct when the prosecutor argued to the jury that defense counsel was using closing argument to send the jurors on a "goose chase," that defense counsel's allegation of witness coaching by the prosecution was "offensive," and that defense counsel's closing arguments consisted of "all smoke and mirrors" designed so jurors "don't look at the real issue." Defendant argues that these statements reflect a pattern of "gratuitously attacking the veracity" of defense counsel similar to that recognized and condemned in *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). In *Unger*, we described the prosecutor's misconduct as follows:

[t]he prosecution also clearly exceeded the bounds of proper argument when it suggested (1) that defense counsel had attempted to "confuse the issue[s]" and "fool the jury" by way of "tortured questioning," "deliberately loaded questions," and "a deliberate attempt to mislead," (2) that defense counsel had attempted to "confuse" and "mislead" the jury by using "red herrings" and "smoke and mirrors," and (3) that defense counsel had attempted "to deter [the jury] from seeing what the real issues are in this case." [*Id.* at 238.]

We also noted in *Unger*, however, that the challenged prosecutorial statements were made during the prosecutor's initial closing statement and "were not in direct response to defense counsel's argument." *Id.* Because the prosecutor's remarks were not in response to defendant's arguments, we opined that the "prosecution's statements in this regard certainly suggested that defense counsel was trying to distract the jury from the truth, and they were therefore improper." *Id.*

In this case, however, the prosecutor's challenged arguments were made during her rebuttal closing argument. This case is distinguishable from *Unger* for that reason. Instead, this case is analogous to *Watson*, 245 Mich App 592. In *Watson*, the prosecutor argued in rebuttal that "the defense in this case is to distract you, make you look over here. Don't pay any attention to the evidence, just look over here, and don't pay any attention to the truth." *Id.* at 592. The prosecutor also compared the defense to a "boatload of red herrings." *Id.* On appeal, this Court acknowledged that "the prosecutor's comments did suggest that defense counsel was trying to distract the jury from the truth." *Id.* Despite that acknowledgment, we recognized that the prosecutor's comments were made in response to the suggestion by defense counsel that "the prosecutor was not concerned about the truth of the events but simply wanted the jury to pick any story and convict defendant simply because the crimes alleged were terrible." *Id.* at 593. For this reason, we found that the prosecutor's comments were a proper response to defense counsel's argument because the comments emphasized the "truth of the big picture." *Id.*

Similarly, the prosecutor's challenged statements in this case suggested that defense counsel was trying to distract the jury from the truth. However, the prosecutor's comments were responsive to defense counsel's arguments and intended to refocus the jurors on the clear evidence against defendant. Under the circumstances, the prosecutor's comments do not establish misconduct. *Watson*, 245 Mich App at 593; *Kennebrew*, 220 Mich App at 608. Defendant has failed to show plain error, *Carines*, 460 Mich at 763, and in any event, a curative instruction would have cured any perceived prejudice, *Ackerman*, 257 Mich App at 449.

Defendant also argues that the trial court erred because it did not calculate sentencing guidelines for any of defendant's offenses. We review this unpreserved sentencing issue for plain error. *Carines*, 460 Mich at 763.

Where a trial court sentences a defendant for multiple concurrent convictions, the sentencing guidelines only apply to the highest crime class conviction and, therefore, the trial courts are required to score only the highest class offense. MCL 771.14(e)(ii) and (iii); *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005). In this case, defendant was convicted of felony-murder, armed robbery, conspiracy to commit armed robbery, and felony-firearm. Of those four convictions, only one, armed robbery, is assigned a crime class under MCL 777.11 *et seq.* Armed robbery is assigned a crime class "A" under MCL 777.16y. Accordingly, under *Mack*, 265 Mich App at 127-128, the trial court committed plain error in failing to score defendant's armed robbery conviction. *Carines*, 460 Mich at 763. The failure to score the guidelines for an offense, as required, entitles a defendant to resentencing. *People v Hill*, 221 Mich App 391, 397; 561 NW2d 862 (1997). We remand this case for resentencing for the scoring of defendant's armed robbery conviction under the sentencing guidelines.

Defendant also raises issues in propria persona in his supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. None warrant reversal.

Defendant argues that the trial court's failure to instruct the jury regarding self-defense both before and *after* closing arguments denied defendant a meaningful opportunity to present a

complete defense.<sup>2</sup> This unpreserved issue is reviewed for plain error. *Carines*, 460 Mich at 763-764.

MCR 2.513(N)(1)<sup>3</sup> provides:

Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, *but at the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments.* After jury deliberations begin, the court may give additional instructions that are appropriate. [Emphasis added.]

The trial court instructed the jurors with the elements of the offenses and defenses *before* closing arguments. Those instructions included instructions on self-defense and the defense of others. *After* closing arguments, the trial court gave the jurors additional instructions regarding the proper consideration of the evidence. On the record before us, the trial court properly exercised the discretion afforded it by the court rule. The instructions given by the trial court placed squarely before the jury defendant's claim of self-defense. Defendant's claim to the contrary is unsupported by the record.

Finally, defendant argues that the prosecutor violated *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963) when she failed to inform defendant that one of the witnesses had provided additional information to the prosecution shortly before trial. Our review of the record reveals that the witness' testimony was not favorable to defendant. Thus, defendant has not shown a *Brady* violation and, thereby, has failed to demonstrate plain error. *Carines*, 460 Mich at 763-764.<sup>4</sup>

Affirmed in part, and remanded for resentencing.

/s/ David H. Sawyer  
/s/ Patrick M. Meter  
/s/ Karen M. Fort Hood

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<sup>2</sup> Defendant does not argue on appeal that the trial court failed to provide notice to the parties that it was going to provide some instructions to the jurors before closing arguments.

<sup>3</sup> Generally, the rules of civil procedure apply to a criminal case unless an exception exists. MCR 6.001(D); *People v Rapp*, 492 Mich 67, 85 n 50; 821 NW2d 452 (2012).

<sup>4</sup> Defendant has abandoned his claim that defense counsel was ineffective for failing to interview the witness who provided the prosecutor with additional information. See *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004).